

THE 'SOFT VENGEANCE' OF THE PEOPLE

POPULAR JUSTICE, COMMUNITY JUSTICE AND LEGAL PLURALISM IN SOUTH AFRICA

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Introduction

There is lack of common understanding with regard to the nomenclature on popular justice, both academics and activists being inconsistent in their use of terminology (see Merry and Milner 1993; Merry 1992; Fitzpatrick 1992; Grant and Schwikkard 1991; Nina 1993a).¹ However, it is generally recognised that in all communities additional (normative) modes of ordering, with their own mechanisms of conflict resolution, co-exist alongside state law.

The inclusion of those modes of ordering within the realm of the 'law' is a contentious matter (Tamanaha 1993). Nonetheless, a 'new legal pluralism' advocates the inclusion of different orders, which co-exist with the state law, although maintaining a level of autonomy (Merry 1988). Within this latter perspective, the existence of multiple 'legal' orders in any one particular community is a manifestation of legal pluralism (Santos 1984, 1985, 1987).

Advancing an argument through the theoretical space provided by the 'new' legal pluralism, we would like to explore the co-existence of different 'modes' of ordering and their 'articulation' in the community (Fitzpatrick 1983). If state law is viewed in this framework its limitations as regards the ordering of society become apparent (Santos 1985). It becomes clear that "state monopoly of law [i.e., the state's capacity to order and regulate] is not absolute" at the community

¹ As discussed below we have experienced similar difficulties in classifying expressions of popular justice in urban communities, developed organically and based on indigenous practices, in relation to mechanisms of conflict resolution within the alternative dispute resolution (ADR) movement.

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level (Nina 1993a: 18).

This paper is not concerned with what could possibly be defined as an 'old' legal pluralism, that is, the relation between state law and indigenous law in Africa - the latter conceived as a variety of so-called traditional or customary law (Uwazie 1993; Quinlan 1988). Instead, taking into consideration what the 'new' legal pluralism advocates (Merry 1988), our contribution examines the realm of community ordering and conflict resolution, which is referred to as 'community justice' (Santos 1992: 132).

It is argued that in South Africa the state interacts with the community through at least two additional informal modes of ordering: one organised by the private sector (namely, non-governmental organisations, NGOs); and the other organically developed by the communities (namely, popular justice).² These modes of ordering create their own notions of justice and establish their own 'laws', defining their corresponding legality. Their interaction, as discussed below, does not occur without contradiction and conflict. In fact, as the case of anti-crime committees discussed below will demonstrate, recent experience has shown that these different modes compete to define a particular 'order' without consensus as to the nature of that order. In the context of the new democratic dispensation in South Africa, which purports to promote the ideals of democracy and equality, it is of particular interest to examine the composition and operation of these additional modes of ordering as well as their relationship with state law.

Popular justice as an urban African phenomenon has a long history in South Africa. It gained impetus when racial discrimination became official government policy with the establishment of the apartheid state in 1948. However, most of the research on the topic began to be conducted only in the 1980s when organs of popular justice developed a clear political identity in relation to and in opposition to the state and 'official state law'. (Hund and Kotu-Rammopo 1983; Suttner 1986; Seekings 1989; Scharf and Ngcokoto 1990) During the transitional period in South Africa (2 February 1990 to 27 April 1994)³, the organs of popular justice continued to develop. In the different communities in which we have conducted

² These two modes do not exclude the existence of other modes which also have influence in defining orders and solving conflicts in the community. For example, the extended family has a major role in solving many interpersonal conflicts within African culture (see Uwazie 1993; Nina and Stavrou 1993).

³ On 2 February 1990 the then State President, F.W. de Klerk, announced in parliament the beginning of a new era in South Africa, leading towards a peaceful democratic transition. 27 April 1994, is the landmark of the first democratic elections in South Africa.

research, the people, through their civic (residential) associations managed to organise and regulate further their own mechanisms of ordering and conflict resolution.⁴

Although this is contrary to the views of several legal academics and state judicial functionaries, it is submitted that the organs of popular justice are not going to disappear in the new South African dispensation. A certain "soft vengeance" (as Albie Sachs, 1990, suggests) has been in operation: the people are still committed to govern.⁵ As a result of the resistance struggle in the 1980s, in matters of ordering and conflict resolution a culture of democratic and popular participation was consolidated which will not easily vanish. Although the democratic state is likely to attempt to incorporate expressions of popular justice into its judicial system, non-state forms of popular justice will still remain.

Our research in the past few years (including the current post-election period) has shown that many communities are still committed to a more participatory role in the definition of acceptable local orders (Nina and Stavrou 1993; Nina 1994). Moreover, many communities view control over the definition of local ordering as a gain of the struggle which they are reluctant to relinquish (Ibid). At the very least they require the state to translate the promise of democracy and equality into something tangible before they cease to exercise this local "sovereignty" (Santos 1982: 253-4).

This paper first provides a theoretical framework of legal pluralism and some critical ideas on popular justice and mediation/Alternative Dispute Resolution (mediation/ADR). Secondly, it contextualises the South African experience of plurality of legal modes and highlights some of our experiences in assisting

⁴ Civic associations are part of the South African legacy of activism against apartheid. They represent voluntary associations of residents in a particular urban community. For many years during the 1980s, the 'civics', as they are popularly known, were aligned with the United Democratic Front/liberation movement. In the post-transition period, the civics are trying to develop a new identity which includes cooperation whilst still retaining an element of resistance to the new government (cf FCR 1994).

⁵ The 'Freedom Charter' of 1955 was the cornerstone declaration which inspired the African National Congress through many years of struggle against apartheid. In its opening words the Freedom Charter states that "the people shall govern". This principle was used, particularly in the mid-1980s during the people's revolts, as a way of organising state parallel institutions, such as organs of popular justice, of which the 'people's courts' are the most famous (Suttner 1986).

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communities in regulating organs of popular justice. Thirdly, we attempt to contextualise the inter-relation between state law and popular and private justice after the election of the first democratic government and provide some ideas as to what the future might look like.

The State and Alternative Modes of Ordering

The demand for community justice is sustained by the inaccessibility of the official state legal system (Abel 1982: 275). The form that community justice takes will be influenced by, as well as influencing the state's response. Community justice that extends the scope of state social control will be sanctioned and promoted by the state. On the other hand if it seeks to appropriate state sovereignty and challenge the state mechanisms of social control it will most likely be outlawed. Between these two extremes is another scenario, in which community justice structures, although seeking to achieve a degree of autonomy from the state (and promoting local governance), acknowledge the legitimacy of the state and in so doing increase the state's resources for social control (Fitzpatrick 1992; Baxi 1985).

At present in South Africa it is possible to distinguish, in addition to state justice, two manifestations of community justice, namely popular justice and private justice. They differ ideologically and structurally and consequently attract different state responses.

Popular justice in the case of Mozambique's experience, is described by Sachs in his usual poetic style thus:

[P]opular justice meant justice that was popular in form, in that its language was open and accessible; popular in its functioning, in that its proceedings were based essentially on active community participation; and popular in its substance, in that judges drawn directly from the people were to give judgment in interests of the people. (Sachs 1984: 99)

Popular justice is expressed through a variety of different structures in South Africa. We perceive it as an African urban expression which co-exists with state law and functions in the absence of the traditional (rural) authorities. People's courts have received the most publicity, but there are a multiplicity of other structures which include street and area committees organised by the civic associations. In certain regions of the country these have been closely linked with the African National Congress. Also operating within the civic associations are disciplinary committees, anti-crime committees, self-defence units and self-

protection units engaging in popular policing.⁶ It is the organic nature of popular justice that distinguishes it from other expressions of justice that operate in the communities such as mechanisms run by NGOs (Nina 1992). By organic we mean that the 'know-how' to reproduce those organs of popular justice is developed and controlled by the people who participate in them; and that the necessary material resources are also controlled by the communities themselves.⁷

In South Africa, as in other societies which have undergone transition, popular justice has been associated with the prefiguration of a future legal system and the rejection of state justice as an instrument of social control (Allison 1990). At present the revolutionary role of popular justice is of little or no significance, the greater concern being access to justice, and in certain communities the consolidation of structures of popular participation and power.

In terms of popular justice, the notion of access to justice is not limited to physical access to the formal courts and to legal representation, but includes a vision of democracy in which citizens are directly involved in the ordering of their community through the formulation of both substantive and procedural justice. It is through this inclusive process that the community seeks to maintain peace and order.

The institutions of formal state justice also seek to maintain peace and order. However, the processes used to reach this goal are the subject of conflict between popular justice and the state. Popular justice, in seeking to attain a level of autonomy from the state by establishing community structures of self-governance, represents a challenge to state authority. In South Africa this conflict has been apparent both before and after the democratic transition (Nina 1994).

⁶ We do not want to argue that popular justice only happens through a systematic process, in a fairly organised and regulated way. In fact, in South Africa today there are many different expressions of popular justice that happen in the absence of the 'table', to paraphrase Foucault (1980). However, our area of study has concentrated on the formal and regulated expressions of popular justice (Grant and Schwikkard 1991).

⁷ This argument is important in the South African context. The distinction between organic and non-organic mechanisms of justice has created important debates in the past few years since mediation/ADR was introduced in many communities (see Nina 1992; Van Der Merwe 1994). The difference appears to be in control of knowledge and financial resources. In this sense, we strongly differentiate mediation/ADR from popular justice. This represents a difference from the USA approach (see Merry and Milner 1993).

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Popular justice structures do not recognise constraints on jurisdiction, in that they will deal with both civil and criminal matters no matter how serious the case.⁸ The legitimacy of the structures is the only real curb on their jurisdiction. Thus the legitimacy accorded by the community to these structures determines whether they are the primary mechanism for dispute resolution within any particular community. Within this broad jurisdictional framework popular justice appropriates state sovereignty by redefining both substantive and procedural notions of the formal law and matters of authority, at least at the community level.

The following are a few examples of the inevitable conflict between popular justice and state justice that arises out of this appropriation of state sovereignty:

(a) The state claims that it has a monopoly on violence. Popular justice structures may infringe this monopoly by sanctioning violent behaviour that the state would classify as criminal. It may do this in two ways: firstly by decisions tolerating violent behaviour by community members, and secondly, by using violence itself as a means of punishment.

(b) The state, whilst employing coercive measures, insists that these are accompanied by due process. Popular justice, which is more concerned with correcting social imbalances, is not primarily concerned with civil rights, and its processes may well not meet the standards of due process. For example, section 25 of South Africa's Constitution Act 200 of 1993, includes amongst others the following tenets of due process: the right to legal representation, the right to remain silent, the right to a public trial, and the right to appeal. In many of the organs of popular justice studied one or more of these rights were abrogated. However, it must be remembered that the demand for due process is based on the recognition that the individual needs to be protected from undue interference by the powerful institutions of the impersonal state. The self-regulatory nature of popular justice precludes undue state interference, and it is in this context that the ideals of due process are subjugated to the needs of the community.⁹

(c) With regard to the administration of justice, popular justice does not recognise

⁸ In matters of a criminal nature organs of popular justice tend to handle most issues with the exception of murder and rape, which are frequently delegated to the police (see Seekings 1992: 95).

⁹ It is interesting that in mediation/ADR many of the formal state due process clauses are also abrogated, in many cases with the express consent of the parties to the dispute. At this level the discussion is not about enhancing or reducing civil rights, but reducing social imbalances and encouraging human harmony (Harrington 1985: 87). See further below.

the notion of separation of powers, unlike state justice which clings to the constitutional fiction that the courts are run by a group of impartial professionals interested in justice for its own sake. The proponents of popular justice adopt the view that the structures of popular justice in certain circumstances can and should express the moral/political will of the most powerful collective within a particular constituency at a particular time (Scharf and Ngcokoto 1990).

(d) Whilst there can be no doubt that popular justice represents a challenge to state authority, on another level popular justice structures expand the state resources for dealing with conflict. Resolution of conflict whether within formal state structures or extra state structures reduces the potential for social disruption. Popular justice resolves conflict in areas which formal state justice is unable to reach. Indeed, the inability of the state to provide solutions to all social conflicts facilitates the establishment and continued existence of popular justice structures.

(e) So long as popular justice enjoys significant support, the state will if it fails to accommodate the ideals of popular justice, run the risk of jeopardizing its own support base. On the other hand, in so far as the state enjoys legitimacy, there will be direct support for its institutions, and this will threaten the legitimacy of popular justice, its structures, and its functional reproduction.

In South Africa the democratic ideals espoused by the newly elected government coincide in many instances with those of the popular justice movement. This is not surprising, since the ANC played a significant role in many areas in promoting popular justice prior to transition, most clearly in Natal (see Nina 1993c; Seekings 1992). Common sense therefore tells us that the compromise scenario outlined above should be attainable. According to this the state accommodates community justice structures which themselves, although seeking to achieve a degree of autonomy from the state, acknowledge the legitimacy of the state.

The next question that arises is whether the form of community justice promoted by NGOs in South Africa can contribute to the building of a model of community justice which retains the ideal of empowerment and autonomy without unduly threatening state sovereignty. These private justice initiatives view mediation as the best problem-solving mechanism. This process has been developed alongside a culture of ADR operating outside of the formal legal structures (Mowatt 1988).¹⁰

¹⁰ Since the early 1990s different NGOs have been involved in the process of training community members in the area of conflict resolution, with special emphasis on mediation. This process has concentrated fundamentally on two levels: inter-group conflicts (e.g. disputes between political organisations at the local level) and interpersonal conflicts (e.g. disputes between neighbours). In the

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There is a distinct ideological difference between popular justice and these NGO initiatives (Nina 1993b). Popular justice incorporates a conscious attempt to gain autonomy from the state. Private justice does not attempt to challenge state control, but supplements it by operating only in those areas where state justice is ineffective. Efficiency and effectivity are determined with reference to the norms of state justice. In general private justice holds that whilst state justice is effective in criminal matters, the formal, adversarial mode of dispute resolution of state justice is not necessarily effective in civil matters (Nina 1993b: 134). The private justice mediation model excludes the broad community from the conflict resolution process and requires a third party who is an outsider to assist the parties in finding a solution to their problem. This project does not attempt to change power relations or transform communities: it only attempts to make people happier where they are. Unlike popular justice, mediation/ADR does not encroach on state sovereignty or at least does not consciously attempt to do so.¹¹ By restricting its jurisdiction to civil matters it does not challenge the state's monopoly on violence. The very nature of the mediation process makes due process a non-issue. Likewise, the separation of powers is not an issue. The impartial third party mediator does not represent any power block, and is there merely to assist the parties to find a solution.

Thus on the face of it 'private justice' would appear to provide a model of community justice that complements rather than conflicts with state justice, and that empowers individuals by enabling them to find their own solutions rather than imposing solutions. Mediation is adopted as a reconciliatory process between parties in conflict (Mowatt 1988), and as a possible solution to the state's limitations in solving interpersonal problems in the community (Van Der Merwe 1994).

Although this mediation/ADR model is subject to criticism (Nina 1992; 1993b), it is important to recognise that it has been accepted in a number of communities in South Africa (Van Der Merwe 1994). It is an additional mode of ordering (in the conflict resolution sense) which articulates itself with the state, and in certain

area of interpersonal conflicts, the most distinctive initiative has been that of the Community Dispute Resolution Trust (CDRT) which has developed the concept of community justice centres, based on the American model of neighbourhood justice centres. (For a critique of South Africa's ADR models see Nina 1993b; Nina 1992; for an analysis of the American model of community justice see Merry and Milner 1993.)

¹¹ This is a result of the voluntary nature of mediation/ADR. The function of the sovereign is exercised, we argue, in an uncontested way (cf Van Der Merwe 1994).

locations with organs of popular justice.

It becomes important to identify the form of interaction of these different processes at the community level. The last years of apartheid saw, at the community level, the consolidation of multiple systems of conflict resolution. Consequently, some communities were exposed to a choice of 'modes' for addressing conflict within the community (Van Der Merwe 1994: 13-17; CDRT 1993: 5).

At the community level the trends were consistent with those worldwide (Harrington 1985). There was a reduction in the state's engagement in the definition of local order and conflict resolution (Nina 1993b: 132). The state law (either in its ordering or conflict solving forms) interacted with local orders and was manifested in a less visible way. But "state law does not disappear: it interacts in a discretionary way" (Nina 1993b: 132). However, it is important to emphasise that in South Africa between 1990 and 1994 the course of change was determined by the illegitimacy of the state. This state tolerated the intervention of NGOs in the provision of order/conflict resolution.

The South African state for a variety of reasons may be relatively willing to accommodate non-governmental mechanisms of ordering and conflict resolution. These reasons may include the perception of a need for more innovative ways of controlling or extending control over the population, or they may simply be the state's lack of funds to sustain its formal structures. Whatever the reason the subtle disappearance of the state law only happens in appearance but not in substance.

As Merry has suggested, this process at the community level is part of a 'new legal pluralism' (1988: 872). She has stated:

The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law towards conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field. (Merry 1988: 873)

This approach forces us, as legal academics, to reconsider what has happened at the community level in South Africa, and what is envisaged for the future. In practical terms, there has been consolidated through popular justice and private justice a recognition of the limits of state law in the community where its sovereignty is not absolute (Santos 1992: 136). Ordering has become a shared

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responsibility. This phenomenon needs to be addressed (cf Brogden and Shearing 1993: chapter 7). This discussion raises the question: what jurisdiction should organs of 'non-state' law enjoy in South Africa?

As discussed above (see also Grant and Schwikkard 1991), popular justice and private justice have different views regarding the limits of jurisdiction. In terms of the South African experience, generally popular justice structures have sought to appropriate as much state authority as possible in the resolution of conflict and the definition of order (Nina 1993a: 4-5). Popular justice in this regard knows no limits, or at least very few.¹² In contrast, the regulation of the interaction between state justice and private justice has been more conservative (Nina 1993b). Its agenda has always been more limited. It has been defined by state action or omission (Mowatt 1988) and by state legislation which has created new areas for mediation/ADR (Mowatt 1992).¹³ It has tended to supplement state ordering, in contrast to popular justice which has sought to modify it (Van Der Merwe 1994).

In the various communities with whom we worked we found that in practice different legal modes competed in claiming to offer the best solution to conflict and in guaranteeing order. The competition could be subtle (Van Der Merwe 1994) or clearly conflictual (Nina 1993c). But in all cases it represented a contestation of state authority and legality at the local level (Santos 1992: 133).

If it is accepted that more than one system of legal ordering operates in the community then the question arises as to how these systems can be constructively articulated. Our contribution has been an attempt to assist in the self-regulation of popular justice structures so that they can begin to articulate with the other two systems of legal ordering (Holtzman and Nina 1993).

[Self]Regulation of Popular Justice in South Africa

It was argued above that expressions of popular justice are an urban phenomenon in South Africa (Seekings 1989). This phenomenon may be located within the

¹² We have already noted that in recent years most popular justice structures have refused to deal with murder and rape cases although it has been alleged that certain structures, like Self-Defence Units, are still prone to handle these type of matters.

¹³ The following state legislation incorporating mediation mechanisms is relevant: Small Claims Courts Act 61 of 1984; Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991; and Mediation in Certain Divorce Matters Act 24 of 1987.

context of an African cultural tradition which was displaced from its original (rural) setting and did not find a place in the urban environment, where the apartheid state was stronger, to reproduce itself in all respects (Bapela 1987). It is justice, or a legality, exercised by workers, unemployed and militants in the urban enclaves named townships. However, the development of this phenomenon of popular justice (manifest, for example, in the people's courts, or the street committees), was influenced by the nature of those involved and by the political conditions in the country.

In particular, in the urban enclaves where African people were segregated civilian activism led to the development of forms of popular governance (FCR 1994). The establishment of civic associations was part of a development that aimed to create structures of local power based in the community and controlled by the residents themselves. In the 1980s in particular these structures of civilian participation were transformed into a militant instrument to fight against the undemocratic regime (Price 1991). The strategy was dual: to contest the policies of reform and to create structures that could prefigure an alternative society (Price 1991; Allison 1990). The emergence of a defiant expression of popular justice in the decade of the 1980s is closely linked to the political campaign of 'organising people's power' (Suttner 1986).¹⁴

However, the tradition of popular justice which existed in the 1980s has, whilst changing and transforming, continued until the present. There are a number of reasons for this continuation, an obvious one being that the formal judicial system remains inaccessible to the majority of the population.¹⁵ Equally important has been the creation by the civic movement of a culture in which engagement in mechanisms of conflict resolution and ordering is part of everyone's responsibilities. Consequently, throughout South Africa the civic movement is

¹⁴ There have been multiple expressions of popular justice in the urban settings of South Africa. However, we argue that the decade of the 1980s was politically different because it aimed at a clear political objective: to create a legality parallel to that of the state, which would assist in the process of prefiguration of the future state justice (see in general Allison 1990).

¹⁵ South Africa's Department of Justice has been trying since April 1994 to address this issue, and has hosted a series of conferences to discuss different solutions to the current crisis of legitimacy of the justice system. For example, on 24-26 February 1995, the Ministry of Justice in association with the Community Peace Foundation (a NGO) hosted a conference entitled "Crime, Security and Human Rights: Justice and The Crisis of Legitimacy - a new paradigm" (Somerset West, Western Cape), where ways of transforming the justice system so as to incorporate popular participation were discussed.

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embodied in organisations representing the interests of particular communities. Since 1992 the civic movement has to a large extent been consolidated through the South African National Civic Organisation (SANCO).

SANCO attempts to organise in most of the urban communities regardless of racial composition, although it is clearly an African based organisation. Most organisations falling under the SANCO umbrella have a similar organisational structure in which each community has an executive committee which is representative of the local community. Each community is divided into area/branch committees (corresponding to the districts into which the community is divided) and each area/branch committee represents an amalgamation of various street committees, the unit component of each street committee being the individual household. It is at the level of street committees that the primary mechanisms of popular justice function in South Africa. The level of efficiency can vary from community to community but throughout the country street committees are engaged in solving community conflicts and maintaining local order. The street committee is an expression of popular justice that preceded the political transition and which still remains.

In the past three years we have assisted various communities in the process of regulating their organs of popular justice. We have called this process 'self-regulation' (Nina 1994). Through the self-regulation of the organs of popular justice the community attempts to make a positive contribution to the development of its own structures of conflict resolution and ordering in a way that reflects the values of a democratic society. This process has to be seen in conjunction with the responsibility that organs of civil society have for the improvement of South African society. This project is consonant with a particular aspect of the 'people's revolts' in the 1980s when the struggle was about 'organising people's power' (Price 1991). The goal of development and reconstruction plays a dominant role in the process of self-regulation.

Unlike the past, at present none of the communities that have started a process of self-regulation denies the authority of state law. These communities see their endeavours as contributing to better access to conflict resolution and maintenance of local order. Grassroots responsibility for providing local governance is accepted without denying the role of the national government. It is a process of shared responsibility.

In Natal for example, the community of Imbali was one of the first in the early 1990s to formulate a proposal for the regulation of popular justice structures. This proposal to a large extent denied state authority. However, as democratic elections became a reality the community's attention focused on the advantages of regulating their relationship with the state police. In the light of the post-election

recognition of state authority, the community has decided to explore the benefits of community-policing and thereafter to redraft its popular justice proposal. The process of self-regulation in Imbali embodied different aspects including: the 'codification' of the practices of popular justice, leading towards the establishment of a uniform model of people's courts; training in conflict resolution (eg. in negotiation and mediation); awareness programmes on aspects of criminal procedure and the formal criminal justice system; and developing members' understanding of a culture of human rights (Nina 1993c).

In the Eastern Cape, SANCO has launched probably the most developed proposal for self-regulation. It incorporates the continuance of its existing anti-crime committees (ACCs) and the establishment of community courts (SANCO 1993). This proposal came out of a process of training and the development of guidelines which could create a uniform system for the whole region.

The ACCs are probably the most sophisticated system of popular policing in operation in the country. Organised as part of the civic structures, each community is required to elect 10 volunteers who will engage in crime prevention and investigation. The volunteers are totally unarmed and pursue the solution of a crime in the community or outside it by employing common sense and by eliciting the co-operation of the residents. Their training emphasises learning about and respect for basic human rights. The volunteers have also been taught about the rights of private citizens to arrest and the limitations of this right. The interaction between this body and the South African Police Services (SAPS) is quite unique. The past year has seen an exchange of support and experience in the combating of crime. However, the ACCs are not part of a project of community policing (cf Stenson 1993; Crawford 1994), but rather of a process of policing by the community.

The ACCs have a very limited jurisdiction and they only try to solve crimes of a socio-economic nature. This includes crimes such as car theft, house breaking and robbery. Murder and rape are always referred to the police, whilst other matters are referred to the civic structures. So far the ACCs in Port Elizabeth (a city in the Eastern Cape) are the most developed and have managed to create their own administrative infrastructure, including the keeping of a record book and other official forms (e.g. identity documents for all the volunteers). The level of development of the ACCs has resulted in SANCO establishing a financial trust which will assist them in providing further financial assistance and resources to this corp of volunteers.

However, the community courts (CCs) project has not been as successful. Local interest in the CCs was lost a long time ago and most of the local residents, including SANCO leadership, seldom remember them. Nonetheless, the CCs

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proposal constitutes a valuable document which could be used in the near future in the formulation of state policy. At a national level, the leadership of SANCO in the Eastern Cape has used its proposal for the establishment of CCs to convince the democratic government of the need to establish lower tiers of courts (see Kobese, Monyela and Nina 1995).¹⁶ This is an interesting process because the need to regulate popular justice within the domain of the state was recognised in an initiative of certain popular sectors, as constituted in civic associations. However, what this suggests is that popular justice regulated and incorporated in the state system will co-exist with other forms of popular justice which will not be incorporated, such as the street committees.

These two cases show the possibility of self-regulation and how this section of civil society can consolidate its autonomy in the area of ordering and conflict resolution. The lesson for us in legal academia is that these experiences are part of an acceptable legal plurality (Fitzpatrick 1983), which could continue to exist in this new era for South Africa. Moreover, as discussed in the case of community courts, the local dynamics in South Africa provide grounds for examining novel processes of relating the autonomy of expression contained in popular justice to state ordering.

Prospects for the Future

The new South African government needs to create mechanisms for facilitating increased access to justice. The legitimacy of the rule of law, in particular, rests amongst other things on the ability of the ordinary citizen to have recourse to a court of law. In this regard, the state is beginning to contemplate the idea of establishing community courts as part of the judicial system of the country. The government has taken various initiatives linking community-based mechanisms of popular policing to the state.

As has been argued, it is the democratic process that was brought into being by the adoption of a new Constitution in 1994 that facilitated the possibility of re-examining the theory of 'new legal pluralism' (Merry 1988). The regulation and control of popular justice by the state will probably follow a similar pattern to that of other African countries after political transition (see Sachs and Honwana-Welch

¹⁶ In fact, in recent developments members of SANCO Eastern Cape leadership have been able to discuss their proposal for the establishment of community courts in the Constitutional Assembly of South Africa's Parliament (see Kobese, Monyela and Nina 1995). It seems as if these lower tier courts will be recognised in the final Constitution of the country.

1990; Santos 1984; Oloka-Onyango 1993). However, the existence of the civic movement in which most of the expressions of popular justice find a nest for their reproduction guarantees the possibility of a duality of popular justice, within and outside of state control. This process will provide us as legal academics with the opportunity of continuing to explore the forms that legal pluralism takes at the community level in South Africa.¹⁷

Conclusion

Community justice is not going to disappear, as it is perceived as, and constitutes an effective tool of empowerment. The challenge facing us is to explore ways in which both state and non-state modes of ordering can constructively interact so as to facilitate better access to justice, partly by ensuring that justice is no longer located exclusively in state courts. In the past the conflict consequent upon the appropriation of the state's jurisdiction by the organs of popular justice appeared to be an insurmountable barrier to constructive interaction. However, the post-election recognition of state authority has a significant effect on this jurisdictional conflict. And, at least in the two examples referred to above, there has been a marked reduction in jurisdictional claims by the organs of popular justice.

However, the 'soft vengeance' approach of the people in continuing to organise themselves irrespective of the election of a democratic government needs to be recognised and taken into account. It is not necessarily a challenge to the state. Well regulated organs of popular justice operating within the confines of the law and the values of the Constitution could be of great assistance in the process of consolidating a democratic and fair society, even though the regulation is not state originated.

The new government will need to engage in constructive dialogue with these structures without imposing itself on them. Failure to do so will mean that many of South Africa's community dwellers will remain subjected to a dual system of justice and apartheid.

¹⁷ There is a current debate in South Africa, at least within legal academia, on how to deal with organs of popular justice. In principle the position is being reduced to a choice between state regulation (maintaining the autonomy of organs of popular justice) and total incorporation (controlling and governing these organs) by the state (see Scharf 1994).

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